IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

OHIO CASUALTY INSURANCE COMPANY, Plaintiff, v. MANIFOLD CONSTRUCTION, LLC, JACK MANIFOLD, WHITTELSEY PROPERTIES, INC., and C.S. WHITTELSEY, IV, Defendants.	)	CASE NO. 3:06-cv-977-MEF

PLAINTIFF'S BRIEF IN
RESPONSE TO DEFENDANTS'
MOTIONS TO DISMISS

Comes now the Plaintiff, Ohio Casualty Insurance Company, and in response to the Defendants' Motions to Dismiss states as follows:

FACTS

1. As the Defendants allege, on February 24, 2005, Defendants Whittelsey Properties, Inc., and C.S. Whittelsey, IV (the "Whittelsey Defendants") filed suit in the Circuit Court of Lee County, Alabama, against Defendants Manifold Construction, LLC and Jack Manifold (the "Manifold Defendants") making tort and contract claims relating to alleged acts and omissions by the Manifold Defendants in connection with

the performance of a construction contract relating to a subdivision. (Defendants' Brief, pp. 2 and 3).

2. Because of the identity of the parties, all of the Lee County Judges recused themselves, causing logistical difficulties and financial pressures on an already strapped state court system and requiring the Alabama Administrative Office of Court to select a judge from outside the Circuit to travel to and preside over the case. (SJIS Docket Sheet attached as Exhibit A).

3. Plaintiff Ohio Casualty Insurance Company ("Ohio Casualty") provided a defense to the Manifold Defendants subject to a reservation of rights.

4. Plaintiff Ohio Casualty was never party to the state court action and the interpretation of its liability policy vis-a-vis the Manifold Defendants and the Whittelsey Defendants was never made an issue for adjudication in the state court action (Defendants Brief, Exhibit B).

5. Plaintiff Ohio Casualty did *attempt* the least invasive form of intervention -- a Motion for Limited Intervention to propound special interrogatories to the jury -- but it did not ever seek a declaratory judgment from the Circuit Court.

6. Significantly, both Defendants have chosen not to make this Court aware that they objected to even this limited intervention by Plaintiff Ohio Casualty and were successful in preventing intervention from being achieved. Specifically, Defendants

herein argued that Ohio Casualty's Motion should be denied because, inter alia, it had no right to intervene and because intervention would violate ARCP 18(c). (Exhibit B hereto). Although the Circuit Court inadvertently granted the Motion for Limited Intervention on April 19, 2006, it on April 26, 2006, entered an order withdrawing the order granting the Motion and stating that it "will reconsider when the case is set for trial[1]. (Exhibit C hereto).

7. However, when the Circuit Court failed to address the Motion for Limited Intervention at the beginning of the trial of the State Court action on October 30, 2006, Plaintiff Ohio Casualty filed this declaratory judgment action on October 31, 2006.

8. Contrary to the Defendants' assertions, this action does not in any way "mirror" the Motion for Limited Intervention which merely sought the ability to procure the Circuit Court to submit interrogatories to the jury.

9. In any event, when the Circuit Judge finally took up the Motion for Limited Intervention on November 2, 2006, the instant declaratory judgment action was already pending and so the Motion was withdrawn.

10. Moreover, as of the date the Defendants filed these patently frivolous Motions

[1]The Circuit Judge later explained that he withdrew his order granting the Motion to Intervene at the request of legal counsel for Whittelsey and Manifold based upon their assertion that intervention would impede efforts to settle the case.

to Dismiss in the instant case, they *knew* there was no parallel state action involving the same issues and parties, and that there never had been.

11. The Defendants' Briefs do not contain any argument that this declaratory judgment action was filed because of some improper motive, that it will not fully and effectively clarify and settle the obligations of the parties under the subject liability policies, or that it will somehow interfere with the State Court action, which has already gone to judgment.

ARGUMENT

A

There Was No Waiver

The Defendants assert that "[b]y withdrawing its motion for limited intervention, Ohio Casualty waived any right it may have had to pursue a declaratory judgment as to the same issues raised in its motion for limited intervention." (Defendants' Brief, p. 4). They go on to state that "Ohio Casualty chose to avoid the most cost effective avenue to resolve the issues as raised in its motion for limited intervention and in its complaint for declaratory judgment." (*Id.*, p. 5).

The Defendant's argument is not only unsupported by the facts and the law, but borders on being disingenuous. As the evidence submitted by the Defendants makes clear, Plaintiff Ohio Casualty did not seek declaratory relief in the State Court action.

Instead it merely sought to intervene to submit interrogatories to the jury regarding certain facts, with the intention of using those answers in a separate, subsequently filed declaratory judgment action. *See, e.g., Farmers Ins. Exchange v. Raine,* 905 So.2d 832 (Ala. Civ. App. 2004).

Contrary to their current assertion that even declaratory relief could have been obtained in that State Court action, the Defendants vehemently objected to even the limited intervention that Plaintiff Ohio Casualty sought, and they *never* withdrew those objections. As a result, the Defendants were successful in preventing intervention and are now judicially estopped from asserting that a significantly more invasive request in that State Court action for declaratory relief by way of intervention would have passed without their objection. *New Hampshire v. Maine,* 532 U.S. 742, 749-750 (2001) (discussing judicial estoppel)[2].

In any event, Plaintiff Ohio Casualty's decision to throw up its hands and file this declaratory judgment action and then withdraw its Motion for Limited Intervention to submit interrogatories was obviously not, and never could be, a waiver of a right to seek declaratory relief from this Court. By filing this declaratory judgment action, Plaintiff Ohio Casualty made crystal clear its intention to seek full

[2]Among other things, ARCP 18(c) would preclude a joint trial of the Whittelsey claims against the Manifold Defendants, with claims for liability insurance, and there are myriad problems with attempting to address all of those claims on a bifurcated basis in the same action. Neither Defendant herein ever agreed to waive those objections.

blown declaratory relief regarding its rights and obligations under its liability insurance policies, and the subsequent withdrawal of the Motion for Limited Intervention shortly thereafter did not express or imply any different intention.

B

***AMERITAS* IS INAPPLICABLE TO THIS CASE**

In *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328 (11th Cir. 2005), the issue was whether a federal district court had the discretion to abstain from adjudicating a declaratory judgment action because of the pendency of a State court action involving the same issues and the same parties. Significantly, the Eleventh Circuit did not hold that a district court had unlimited discretion to do so. Instead, it gave certain "guideposts" for consideration and affirmed abstention under the particular facts of that case. However, none of the circumstances present in *Ameritas* are present in the instant action.

In affirming the District Court in that case, the Eleventh Circuit noted that "the state court action encompassed the complete controversy" while the District Court "had before it only an incomplete set of parties and claims...". *Id*, at 1331. In the instant case, however, there is no pending state court action encompassing any of the insurance coverage issues, much less all of them. Moreover, each of the issues and

necessary parties[3] are currently before this Court, and the Defendants do not even argue that this Court cannot satisfactorily adjudicate the claims of all of the parties and fully settle the controversy.

In *Ameritas* the Eleventh Circuit also noted that there was a difficult question of subject matter jurisdiction present. That is not the case in the instant litigation and the Defendants do not argue otherwise.

The Eleventh Circuit in *Ameritas* further observed that "to allow the declaratory action to proceed would amount to the unnecessary and inappropriate 'gratuitous interference' with the more encompassing and currently pending state action...", *Id.*, at 1332. However, and as previously mentioned, there is no "currently pending state action," much less one that is "more encompassing" than this action, and there never has been. Therefore, the Defendants' contention that "Ohio Casualty's present action mirrors its motion for limited intervention..." is baseless. (Defendant's Brief, p. 6)[4].

Finally, without citing any supporting evidence, the Defendants herein argue that "[i]t seems Ohio Casualty attempted to avoid further state court proceedings by

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[3]Because Melissa Manifold and C.S. Whittelsey, III, were not parties to the verdict entered in the State Court action, they are not necessary parties to this action.

[4]Defendants assert that "a declaratory judgment action is not necessary in federal court as the issues raised in Ohio Casualty's complaint could be addressed in state court under Alabama's Direct Action Statute. See, *Ala. Code* 1975 § 27-23-2." However, that statute, which would permit the Whittelsey Defendants to assert a claim directly against Ohio Casualty, has not been invoked by them. Even if it was, by virtue of FRCP 13 such a claim would constitute a compulsory counterclaim in the instant action and, as the Defendants themselves point out (Defendant's Brief, p. 7) *Ala. Code* § 6-5-440 (1975) would prevent its simultaneous assertion in State court.

racing to federal court." (Defendant's Brief, pp. 6-7). If Plaintiff Ohio Casualty was engaged in a "race" to the federal courthouse, it certainly would not have filed its Motion for Limited Intervention in state court and delayed for over seven months to file the instant action. Thanks to the Defendants' objections, however, Plaintiff Ohio Casualty was met with a stone wall in State Court.

Thus, none of what the Eleventh Circuit classified at page 1332 of its opinion as being "primary factors" justifying abstention are present in the instant case. Further, the other, presumably secondary, factors are insufficient to justify abstention. *See, generally, Pennsylvania Lumbermen Mut. Ins. Co. v. T.R. Mill Co., Inc.*, 2006 WL 276964 (S.D. Ala. 2006) (denying motion to dismiss a declaratory judgment action seeking an interpretation of an insurance policy issued to an Alabama insured even though Alabama state law governed the dispute).

C

***Ala. Code* § 6-5-440 Is Inapplicable To The Instant Case**

There is not a single Alabama case which even intimates that *Ala. Code* § 6-5-440 precludes a liability insurance carrier from simultaneously pursuing a declaratory action seeking a judicial declaration of its rights and obligations under a liability insurance policy while at the same time seeking merely to propound interrogatories to a jury in an action for damages against its insured, the answers to which would

constitute evidence in the declaratory judgment action. Indeed, by virtue of ARCP 18(c), that is sometimes necessary.

In any event, and as the Defendants herein well knew when they filed this frivolous motion, the Motion For Limited Intervention had previously been withdrawn and is no longer pending. Therefore, even if a Motion For Limited Intervention was erroneously deemed to be an "action" under § 6-5-440, that statute does not require or even justify the dismissal of this case.

CONCLUSION

For the reasons stated hereinabove, the Plaintiff respectfully submits that the Defendants' Motions to Dismiss are due to be denied.

/s/ Christopher Lyle McIlwain
Christopher Lyle McIlwain (MCI-002)
Attorney for Plaintiff
Ohio Casualty Insurance Company

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties, and I hereby certify that, to the best of my knowledge and belief, there are no non-CM/ECF participants to whom the foregoing is due to be mailed by way of the United States Postal Service.

s/ Christopher Lyle McIlwain

EXHIBIT "A"

Settings | Parties | Case Action Summary | Witness List | Financial | Consolidated CAS

County	43	Case Number	CV 2005 000137 00	JID	XXX	Trial	J
Style	WHITTELSEY PROPERTIES, INC, C SHELDON WHITTELSEY, III, C SHELDON WHITT						
Code	TOXX	Type	FRAUDULENT MISREPRES	Filed	02242005	Track	
Amount		Status	ACTIVE	Plaintiffs	003	Defendants	003
DJID		Court Action	00000000			For	
Damages-Comp		Damages-Pun		Damages-Gen		No Damages	
Trial Days		Lien					

Date 1		Que 1		Time 1		Description	
Date 2		Que 2		Time 2		Description	
Date 3	10302006	Que 3	001	Time 3	0900 A	Description	JTRL TRIAL - JURY
Date 4	04172006	Que 4	001	Time 4	1000 A	Description	SCHC SCHEDULE CONFERENCE
Cont Date		Why				Cont #	
RevJmt		Admin Date		Why			
Appeal Date		CRT		Case	0000 000000 00		
TBNV1		TBNV2		DSDT		DTYP	
Comment 1							
Comment 2							

Party	C 001	Name	WHITTELSEY PROPERTIES, INC			Type	BUSINESS
INDX	D MANIFOLD CON	ANAM				JID	XXX
SSN		Address 1				Sex	
DOB		Address 2				Race	
Country	US	City	AL 00000 0000			Phone	334 000 0000
Atty 1	WHITTELSEY DAVIS B	Atty 2		Atty 3		Atty 4	
Atty 5		Atty 6					
Issued		Type		Reissue		Type	
Return		Type		Return		Type	
Service		Type		Serv On		By	
Answer		Type		NS Not		NA Not	
Warrant		Type		Arrest			
CACT		Date		For		Exep	O
AMT		Cost		Other		Satisfied	
Comment							

Party	C 002	Name	WHITTELSEY C SHELDON, III			Type	INDIVIDUAL
INDX	D MANIFOLD CON	ANAM				JID	XXX
SSN		Address 1				Sex	
DOB		Address 2				Race	
Country	US	City	AL 00000 0000			Phone	334 000 0000
Atty 1	WHITTELSEY DAVIS B	Atty 2		Atty 3		Atty 4	
Atty 5		Atty 6					
Issued		Type		Reissue		Type	
Return		Type		Return		Type	
Service		Type		Serv On		By	
Answer		Type		NS Not		NA Not	

Warrant		Type		Arrest			
CACT		Date		For		Exep	O
AMT		Cost		Other		Satisfied	
Comment							

Party	C 003	Name	WHITTELSEY C SHELDON, IV			Type	INDIVIDUAL
INDX	D MANIFOLD CON	ANAM				JID	XXX
SSN		Address 1				Sex	
DOB		Address 2				Race	
Country	US	City	AL 00000 0000			Phone	334 000 0000
Atty 1	WHITTELSEY DAVIS B	Atty 2		Atty 3		Atty 4	
Atty 5		Atty 6					
Issued		Type		Reissue		Type	
Return		Type		Return		Type	
Service		Type		Serv On		By	
Answer		Type		NS Not		NA Not	
Warrant		Type		Arrest			
CACT		Date		For		Exep	O
AMT		Cost		Other		Satisfied	
Comment							

Party	D 001	Name	MANIFOLD CONSTRUCTION, LLC			Type	BUSINESS
INDX	C WHITTELSEY P	ANAM				JID	XXX
SSN		Address 1	JACK MANIFOLD, AGENT			Sex	
DOB		Address 2	221 COOK STREET			Race	
Country	US	City	AUBURN AL 36830 0000			Phone	334 000 0000
Atty 1	SMITH BRADLEY JOHNS	Atty 2	SMITH BRADLEY JOHNS	Atty 3	SMITH BRADLEY JOHNS	Atty 4	
Atty 5		Atty 6					
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Return		Type		Return		Type	
Service	02252005	Type	V PROCESS SERVE	Serv On		By	
Answer	10262006	Type	U UNKNOWN	NS Not		NA Not	
Warrant		Type		Arrest			
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AMT		Cost		Other		Satisfied	
Comment							

Party	D 002	Name	MANIFOLD JACK			Type	INDIVIDUAL
INDX	C WHITTELSEY P	ANAM				JID	XXX
SSN		Address 1	401 WILLOW CREEK ROAD			Sex	
DOB		Address 2				Race	
Country	US	City	AUBURN AL 36832 0000			Phone	334 000 0000
Atty 1	SMITH BRADLEY JOHNS	Atty 2	SMITH BRADLEY JOHNS	Atty 3		Atty 4	
Atty 5		Atty 6					
Issued	02252005	Type	A PROCESS SERVE	Reissue		Type	
Return		Type		Return		Type	
Service	02252005	Type	V PROCESS SERVE	Serv On		By	
Answer	08242006	Type	D COMP DENIED	NS Not		NA Not	
Warrant		Type		Arrest			
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AMT		Cost		Other		Satisfied	
Comment							

Party	D 003	Name	MANIFOLD MELISSA			Type	INDIVIDUAL
INDX	C WHITTELSEY P	ANAM				JID	XXX
SSN		Address 1	401 WILLOW CREEK ROAD			Sex	
DOB		Address 2				Race	
Country	US	City	AUBURN AL 36832 0000			Phone	334 000 0000
Atty 1	MCLAUGHLIN JAMES DON	Atty 2	SMITH BRADLEY JOHNS	Atty 3		Atty 4	
Atty 5		Atty 6					
Issued	02252005	Type	A PROCESS SERVE	Reissue		Type	
Return		Type		Return		Type	
Service	02252005	Type	V PROCESS SERVE	Serv On		By	
Answer		Type		NS Not		NA Not	
Warrant		Type		Arrest			
CACT		Date		For		Exep	O
AMT		Cost		Other		Satisfied	
Comment							

Date	Time	Code	Comments	Operator
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02242005	1539	PART	WHITTELSEY C SHELDON, III ADDED AS C002 (AV02)	STM
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02242005	1539	PART	WHITTELSEY C SHELDON, IV ADDED AS C003 (AV02)	STM
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04272005	0815	ATTY	LISTED AS ATTORNEY FOR D003: SMITH BRADLEY JOHNS	STM
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05042005	1136	TEXT	MOTION 2 DISMISS	STM
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01112006	0935	TEXT	TECUM DIRECTED 2 C SHELDON WHITTELSEY, IV & WHIT	STM
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01252006	0747	TRAN	TRANSMITTAL NOTICE SENT TO ALL ATTORNEYS	STM
01252006	1259	PRTY	PARTY ADDED W007 SOUTHEASTERN POND MANAGEMENT	STM
01252006	1259	ISSD	PARTY W007 ISSUED DATE: 01252006 TYPE: SHERIFF	STM
01252006	1300	PRTY	PARTY ADDED W008 BROWN AGENCY (AW21)	STM
01252006	1300	ISSD	PARTY W008 ISSUED DATE: 01252006 TYPE: SHERIFF	STM
01252006	1300	PRTY	PARTY ADDED W009 P KENDRICK CONSTRUCTION (AW21)	STM
01252006	1300	ISSD	PARTY W009 ISSUED DATE: 01252006 TYPE: SHERIFF	STM
02012006	1009	TEXT	NOTICE OF NTENT 2 SERVE SUBP ON NPTY/ALFA MUTUAL	STM
02012006	1009	TEXT	NOTICE OF NTENT 2 SERVE SUBP ON NPTY/ANB INSURANCE	STM
02012006	1157	SERC	SERVICE OF SERVED PERSON ON 01272006 FOR W008 (A	STM
02022006	1642	DAT4	SET FOR: SCHEDULE CONFERENCE ON 04/17/2006 AT 100	STM
02132006	0829	TEXT	NOTICE 2 CLERK OF THE CIRCUIT COURT	STM
02132006	1008	TEXT	WHITTELSEY PROPERTIES, INC ET AL'S RESPONSES 2 DEF	STM
02132006	1008	TEXT	2ND INTERROGATORIES & REQUEST 4 PRODUCTION	STM
02132006	1409	SERC	SERVICE OF SERVED PERSON ON 02032006 FOR W009 (A	STM
02142006	0908	TEXT	NOTICE 2 CLERK OF THE CIRCUIT COURT	STM
02212006	1004	TEXT	ANSWER 2 2ND AMENDED COMPLAINT & AMENDED ANSWER 2	STM
02212006	1004	TEXT	ORIGINAL & 1ST AMENDED COMPLAINT	STM
02232006	1132	SERC	SERVICE OF SERVED PERSON ON 01302006 FOR W007 (A	STM
03092006	1108	PRTY	PARTY ADDED W010 ANB INSURANCE SERVICES (AW21)	STM
03092006	1108	ISSD	PARTY W010 ISSUED DATE: 03092006 TYPE: SHERIFF	STM
03092006	1109	PRTY	PARTY ADDED W011 ALFA MUTUAL INSURANCE CO (AW21)	STM
03092006	1109	ISSD	PARTY W011 ISSUED DATE: 03092006 TYPE: SHERIFF	STM
03152006	0911	TEXT	NOTICE OF NTENT 2 SERVE SUBPOENA ON NPTY/HARLEYSVI	STM

03172006	1616	TEXT	PLFS RESPONSE 2 MOTION 4 LIMITED INTERVENTION BY	STM
03172006	1616	TEXT	OHIO CASUALTY INSURANCE COMPANY	STM
03222006	1231	TEXT	NOTICE OF SERVICE OF DISCOVERY DOCUMENTS	STM
03232006	1541	SERC	SERVICE OF SERVED PERSON ON 03142006 FOR W011 (A	STM
03232006	1622	TEXT	OPPOSITION 2 MOTION 4 LIMITED INTERVENTION	STM
03242006	0810	TEXT	MOTION 4 LIMITED INTERVENTION BY OHIO CASUALTY	STM
03242006	0810	TEXT	INS CO-NO COVER SHEET	STM
03312006	1628	TEXT	ORDER SETTING PENDING MOTIONS 4 HEARING APR 17,	STM
03312006	1628	TEXT	2006 AT 10:00	STM
03312006	1628	TRAN	TRANSMITTAL NOTICE SENT TO ALL ATTORNEYS	STM
04062006	1600	TEXT	MOTION COVER SHEET/MOTION 4 LIMITED INTERVENTION	STM
04172006	0936	TEXT	AMENDMENT 2 MOTION 4 LIMITED INTERVENTION	STM
04192006	1416	SERC	SERVICE OF SERVED PERSON ON 04052006 FOR W010 (A	STM
04202006	1518	TEXT	ORDER GRANTING MOTION 4 LIMITED INTERVENTION	STM
04202006	1519	TRAN	TRANSMITTAL NOTICE SENT TO ALL ATTORNEYS	STM
04252006	0827	TEXT	PETITION 4 LETTERS ROGATORY	STM
04282006	1600	TEXT	ORDER W/DRAWING ITS PREVIOUS ORDER GRANTING THE	STM
04282006	1600	TEXT	MOTION 2 INTERVENE & WILL RECONSIDER WHEN THE	STM
04282006	1600	TEXT	CASE IS SET 4 TRIAL	STM
05022006	1443	TEXT	ORDER GRANTING PETITION 4 LETTERS ROGATORY	STM
05022006	1601	TRAN	TRANSMITTAL NOTICE SENT TO ALL ATTORNEYS	STM
06192006	0903	DAT3	SET FOR: TRIAL - JURY ON 10/30/2006 AT 0900A(AV01)	STM
06192006	0903	TRAN	TRANSMITTAL NOTICE SENT TO ALL ATTORNEYS	STM
07102006	0928	TEXT	NOTICE OF NTENT 2 SERVE SUBP ON NPTY/CITY OF OPELI	STM
07132006	1246	TEXT	MOTION COVER SHEET	STM
07132006	1246	TEXT	MOTION 4 LEAVE 2 FILE 3RD AMENDED COMPLAINT	STM
07132006	1631	TEXT	NOTICE OF NTENT 2 SERVE SUBP ON NPTY/CITY OF	STM
07132006	1631	TEXT	OPELIKA, CITY OF AUBURN, AL LICENSING BOARD 4	STM
07132006	1631	TEXT	GENERAL CONTRACTORS, CITY OF MONTGOMERY	STM
07182006	1512	TEXT	ORDER ALLOWING POST 3RD AMENDED COMPLAINT	STM
07202006	1403	TEXT	RENEW MOTION 2 FILE ATTACHED 3RD AMENDED COMPLAINT	EUM
07242006	1153	TEXT	PLFS FINAL 3RD AMENDED COMPLAINT	STM
07242006	1507	TEXT	PLF'S 3RD AMENDED COMPLAINT	STM
07242006	1541	TEXT	DEF MANIFOLD CONSTRUCTION'S OPPOSITION 2 PLF'S 3RD	STM
07242006	1541	TEXT	AMENDED COMPLAINT	STM
07252006	0852	TEXT	ORDER ALLOWING POST 3RD AMENDED COMPLAINT	STM
07262006	1533	PRTY	PARTY ADDED W012 CITY OF OPELIKA (AW21)	STM
07262006	1533	ISSD	PARTY W012 ISSUED DATE: 07262006 TYPE: PROCESS SE	STM
07312006	1416	PRTY	PARTY ADDED W013 CITY OF MONTGOMERY (AW21)	STM
07312006	1416	ISSD	PARTY W013 ISSUED DATE: 07282006 TYPE: UNKOWN	STM
07312006	1417	PRTY	PARTY ADDED W014 CITY OF AUBURN (AW21)	STM
07312006	1417	ISSD	PARTY W014 ISSUED DATE: 07282006 TYPE: UNKOWN	STM
07312006	1418	PRTY	PARTY ADDED W015 CITY OF OPELIKA (AW21)	STM
07312006	1418	ISSD	PARTY W015 ISSUED DATE: 07282006 TYPE: UNKOWN	STM
07312006	1419	PRTY	PARTY ADDED W016 AL LICENSING BOARD FOR (AW21)	STM
07312006	1419	ISSD	PARTY W016 ISSUED DATE: 07282006 TYPE: UNKOWN	STM
08102006	0757	SERC	SERVICE OF CERTIFIED MAIL ON 08022006 FOR W016 (A	STM
08102006	0757	SERC	SERVICE OF CERTIFIED MAIL ON 08012006 FOR W013 (A	STM
08162006	1213	TEXT	REPORT OF MEDIATOR	STM
08182006	1600	TEXT	MOTION COVER SHEET	STM
08182006	1600	TEXT	MOTION 4 LEAVE 2 FILE 4TH AMENDED COMPLAINT ADDING	STM
08182006	1600	TEXT	AND/OR SUBSTITUTING JACK MANIFOLD 4 FICTITIOUS	STM
08182006	1600	TEXT	PARTY DEF "A" AND/OR OTHERWISE JOINING JACK	STM
08182006	1600	TEXT	MANIFOLD AS AN ADDITIONAL PARTY DEF HEREIN	STM

08212006	0958	TEXT	ACCEPTANCE OF SERVICE	STM
08242006	1412	ATTY	LISTED AS ATTORNEY FOR D001: SMITH BRADLEY JOHNS	AJA
08242006	1412	ANSW	ANSWER OF COMP DENIED ON 08/24/2006 FOR D001(AV02)	AJA
08242006	1414	ATTY	LISTED AS ATTORNEY FOR D002: SMITH BRADLEY JOHNS	AJA
08242006	1414	ANSW	ANSWER OF COMP DENIED ON 08/24/2006 FOR D002(AV02)	AJA
08252006	0744	TEXT	ORDER ALLOWING 4TH AMENDED COMPLAINT	STM
08302006	1555	TEXT	PLF'S MOTION 4 DESIGNATION OF EXPERT WITNESSES-	STM
08302006	1556	TEXT	NO COVER SHEET	STM
08312006	0955	TEXT	DEFS RULE 26 DISCLOSURE OF EXPERT WITNESS	STM
09072006	1235	TEXT	NOTICE 2 CLERK OF THE CIRCUIT COURT	STM
09072006	1235	TEXT	NOTICE 2 CLERK OF THE CIRCUIT COURT	STM
09122006	1645	ATTY	LISTED AS ATTORNEY FOR D001: SMITH BRADLEY JOHNS	AJA
10162006	1552	TEXT	PLAINTIFFS WITNESS LIST	MAM
10162006	1552	TEXT	PLAINTIFFS EXHIBIT LIST	MAM
10182006	1442	TEXT	NOTICE 2 CLERK OF THE CIRCUIT COURT	STM
10182006	1442	TEXT	DEF'S WITNESS LIST	STM
10182006	1442	TEXT	DEF'S EXHIBIT LIST	STM
10192006	0745	TEXT	PLFS OBJECTION 2 VARIOUS EXHIBITS LISTED IN DEFS	STM
10192006	0745	TEXT	EXHIBIT LIST & 1ST AMENDED EXHIBIT LIST	STM
10202006	0830	PRTY	PARTY ADDED W017 WALTER "DOC" DORSEY (AW21)	STM
10202006	0830	ISSD	PARTY W017 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0830	PRTY	PARTY ADDED W018 BRADY POLLOCK (AW21)	STM
10202006	0830	ISSD	PARTY W018 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0831	PRTY	PARTY ADDED W019 LAURA ALLEN (AW21)	STM
10202006	0831	ISSD	PARTY W019 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0831	PRTY	PARTY ADDED W020 TROY GODWIN (AW21)	STM
10202006	0831	ISSD	PARTY W020 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0832	PRTY	PARTY ADDED W021 ROBERT WILLIAMS (AW21)	STM
10202006	0832	ISSD	PARTY W021 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0833	PRTY	PARTY ADDED W022 TOMMY BRASWELL (AW21)	STM
10202006	0833	ISSD	PARTY W022 ISSUED DATE: 10192006 TYPE: CERTIFIED	STM
10202006	0834	PRTY	PARTY ADDED W023 BRET MCNALLY (AW21)	STM
10202006	0834	ISSD	PARTY W023 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0834	PRTY	PARTY ADDED W024 MARRELL MCNEAL (AW21)	STM
10202006	0834	ISSD	PARTY W024 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0835	PRTY	PARTY ADDED W025 JUDGE BILL ENGLISH (AW21)	STM
10202006	0835	ISSD	PARTY W025 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0837	PRTY	PARTY ADDED W026 BILLY OGLETREE (AW21)	STM
10202006	0837	ISSD	PARTY W026 ISSUED DATE: 10192006 TYPE: PROCESS SE	STM
10202006	0934	PRTY	PARTY ADDED W027 GAVIN NAWROCKI (AW21)	STM
10202006	0934	ISSD	PARTY W027 ISSUED DATE: 10202006 TYPE: PROCESS SE	STM
10202006	0934	PRTY	PARTY ADDED W028 JOHN FULLER (AW21)	STM
10202006	0934	ISSD	PARTY W028 ISSUED DATE: 10202006 TYPE: PROCESS SE	STM
10202006	0935	PRTY	PARTY ADDED W029 MARTY OGRAN (AW21)	STM
10202006	0935	ISSD	PARTY W029 ISSUED DATE: 10202006 TYPE: PROCESS SE	STM
10202006	0935	PRTY	PARTY ADDED W030 PHILLIP KENDRICK (AW21)	STM
10202006	0935	ISSD	PARTY W030 ISSUED DATE: 10202006 TYPE: PROCESS SE	STM
10202006	0936	PRTY	PARTY ADDED W031 DANNY KENDRICK (AW21)	STM
10202006	0936	ISSD	PARTY W031 ISSUED DATE: 10202006 TYPE: PROCESS SE	STM
10202006	1436	TEXT	DEF'S AMENDED WITNESS & EXHIBIT LIST	STM
10232006	1629	TEXT	PLF'S PRE-TRIAL CONTENTIONS	STM
10252006	1032	PRTY	PARTY ADDED W032 DAVID STROBEL (AW21)	STM
10252006	1032	ISSD	PARTY W032 ISSUED DATE: 10242006 TYPE: PROCESS SE	STM
10252006	1033	PRTY	PARTY ADDED W033 MIKE SHANNON (AW21)	STM

10252006	1033	ISSD	PARTY W033 ISSUED DATE: 10242006 TYPE: PROCESS SE	STM
10252006	1033	PRTY	PARTY ADDED W034 MELISSA MANIFOLD (AW21)	STM
10252006	1033	ISSD	PARTY W034 ISSUED DATE: 10242006 TYPE: PROCESS SE	STM
10252006	1034	PRTY	PARTY ADDED W035 MAURICE PATTON (AW21)	STM
10252006	1034	ISSD	PARTY W035 ISSUED DATE: 10242006 TYPE: PROCESS SE	STM
10252006	1034	PRTY	PARTY ADDED W036 DAVID ROUSE (AW21)	STM
10252006	1034	ISSD	PARTY W036 ISSUED DATE: 10242006 TYPE: PROCESS SE	STM
10252006	1234	TEXT	TRIAL CONTENTIONS	STM
10262006	1038	ANSW	ANSWER OF UNKNOWN ON 10/26/2006 FOR D001 (AV02)	AJA

EXHIBIT "B"

IN THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

WHITTELSEY PROPERTIES, INC., et al., *

Plaintiffs, *

v. * CASE NO.: CV-05-137

MANIFOLD CONSTRUCTION, LLC, et al., *

Defendants. *

PLAINTIFFS' RESPONSE TO MOTION FOR LIMITED INTERVENTION BY OHIO CASUALTY INSURANCE COMPANY

Come now the Plaintiffs in the above styled cause of action and in response to the motion for limited intervention filed by Ohio Casualty Insurance Company (hereinafter referred to as "Ohio Casualty") show unto this Honorable Court the following:

1. On or about the 13th day of March, 2006, Ohio Casualty filed its motion for limited intervention for the sole purpose of submitting special interrogatories to the jury relating to insurance coverage.

2. The request for limited intervention presented by Ohio Casualty's motion is due to be denied. Such requests have been sufficiently addressed by the Alabama Supreme Court in Universal Underwriters Insurance Co. v. East Central Alabama Ford-Mercury, Inc., 574 So.2d 716 (Ala. 1990) and Mutual Assurance, Inc. v. Chancey, 781 So.2d 172 (Ala. 2000). Copies of these cases are attached hereto for the convenience of the Court.

3. "[A]n insurer 'does not have a direct, substantial, and protectable interest' under Ala.R.Civ.P. 24(a)(2) because its interest is contingent upon the plaintiff's recovery on the underlying claims." Mutual Assurance, Inc. v. Chancey, 781 So.2d 172, 174 (Ala. 2000).

4. Furthermore, Ala.R.Civ.P. 19(e) does not allow a jury trial of a liability insurance coverage question jointly with the trial of a related damage claim against an insured."

WHEREFORE, the above premises considered, Plaintiffs pray this Honorable Court will deny the motion filed by Ohio Casualty.

Respectfully submitted this the 16th day of March, 2006.

WHITTELSEY, WHITTELSEY & POOLE, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document on the parties listed below by placing a copy of the same in the United States mail, postage prepaid, to their correct address on this the 16th day of March, 2006.

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DAVIS B. WHITTELSEY

574 So.2d 710

574 So.2d 710

(Cite as: 574 So.2d 710)

Supreme Court of Alabama.
UNIVERSAL UNDERWRITERS INSURANCE COMPANY
v.
EAST CENTRAL ALABAMA FORD-MERCURY, INC., et al.
UNIVERSAL UNDERWRITERS INSURANCE COMPANY
v.
FORD MOTOR COMPANY, INC., et al.
89-541, 89-613 to 89-622.

Sept. 28, 1990.
As Modified on Denial of Rehearing Jan. 18, 1991.

Automobile buyer brought suit against dealer, claiming fraud, breach of warranty, willful, wanton, and reckless conduct, and conspiracy arising out of resale of automobiles purchased from rental companies. Dealer's insurer sought to intervene. The Circuit Court, Montgomery County, Nos. CV-87-138, CV-87-188, CV-87-271, CV-87-140, CV-87-1955, CV-87-139, CV-87-706, CV-87-536, CV-87-774 and CV-87-164, Charles Price, J., denied the requests for intervention as of right and permissively. Insurer appealed. The Supreme Court, Hornsby, C.J., held that: (1) the insurer did not have a sufficient interest to be entitled to intervene as of right where its interest was contingent on the result in the underlying case; (2) trial court did not abuse its discretion in refusing permissive intervention; and (3) remand was necessary for further proceedings on whether the insurer would be permitted to intervene under new procedures that would allow for bifurcation of the trial.

Affirmed and remanded.

Jones, J., dissented with opinion.

Houston, J., dissented.

West Headnotes

[1] Appeal and Error ⚖95
30k95 Most Cited Cases
Order denying intervention as of right is appealable. Rules Civ.Proc., Rule 24(a).

[2] Insurance ⚖2926
217k2926 Most Cited Cases
(Formerly 217k514.15)
Defense attorneys hired by insurer to represent its insured can take no action that would be detrimental to insured's interest in action against insured and, therefore, those attorneys could not request special interrogatories and special verdicts on issue of coverage; insurer provided defense but reserved its right to deny coverage after final determination of case, and insurer's obligation to defend extended to all claims, even those not covered by policy.

[3] Parties ⚖40(7)
287k40(7) Most Cited Cases
Insurer did not have direct, substantial, and protectible interest that would entitle it to intervene as of right in action against its insured to obtain determination of coverage issues; insurer's interest was contingent upon result of underlying action, and insurer could litigate coverage issue in separate declaratory judgment action after resolution of underlying action. Rules Civ.Proc., Rule 24(a)(2).

[4] Parties ⚖40(7)
287k40(7) Most Cited Cases
Trial court did not abuse its discretion in refusing to grant insurer's request for permissive intervention in action against insured. Rules Civ.Proc., Rule 24(b)(2).

[5] Trial ⚖3(5.1)
388k3 Most Cited Cases
(Formerly 388k3.5)
Trial court grants insurer's request for permissive intervention in suit against insured, trial should be

bifurcated and issues of liability should be reserved between plaintiff and insured and then, after verdict or judgment against insured, insurer could be allowed to enter and try issue of coverage. Rules Civ.Proc., Rules 24(b)(2), 42(b), 57.

[6] Appeal and Error ⚖1144
30k1144 Most Cited Cases
Remand was necessary for further proceedings on whether insurer would be permitted to intervene in action against insured, even though there was no abuse of discretion in denial of permissive intervention, where new procedures were set forth for permissive intervention and bifurcated trial. Rules Civ.Proc., Rules 24(b)(2), 42(b), 57.

*717 David E. Allred of Hill, Hill, Carter, Franco, Cole & Black, Montgomery, and Bibb Allen of Rives & Peterson, Birmingham, for appellants.

H. Dean Mooty, Jr. of Capell, Howard, Knabe & Cobbs, Montgomery, for appellees Auburn Ford Lincoln Mercury, Inc. and Fred Rich.

Susan Shirock DePaola of Samford & Depaola and John N. Pappanastos, Montgomery, for appellee Mamie R. Green.

Edward B. Parker II, Montgomery, for appellee East Central Alabama Ford-Mercury, Inc.

Tabor R. Novak, Jr., Montgomery, for appellee Ford Motor Co. and Ira DeMent, Montgomery, for Youngblood-Perry Lincoln Mercury, Inc.

John W. Huley of Hare, Wynn, Newell & Newton, Birmingham, for amicus curiae Alabama Trial Lawyers Assoc.

Travis Carr, Pierce, Carr & Alford, P.C., Mobile, for amicus curiae Alabama Defense Lawyers Assoc.

HOUSTON, Chief Justice.

This appeal involves several issues concerning the right of Universal Underwriters Insurance Company ("Universal") to intervene in various lawsuits pending against defendants insured by Universal. We affirm the ruling of the trial court in *718 each case that Universal is not entitled to intervene under the present circumstances, but we remand the case for further proceedings consistent with this opinion.

FACTS

In the first case ("East Central Alabama Ford-Mercury, Inc."), plaintiff Mamie Green sued defendants East Central Alabama Ford-Mercury, Inc., and Auburn Ford Lincoln-Mercury, Inc., claiming fraud; breach of express warranty; violation of the Magnuson-Moss Warranty Act; willful, wanton and reckless conduct; and conspiracy. The plaintiff alleges that the defendants sold automobiles repurchased from rental car companies as "factory executive" automobiles, i.e., as cars not previously owned or titled to anyone other than Ford Motor Company.

Universal, as the defendants' insurer, sought to intervene in the suit for the sole purpose of submitting special interrogatories or a special verdict form to the jury. Universal was attempting to resolve any insurance coverage questions that might be involved in the case without making its presence as an insurer known to the jury. Universal contends that some of the claims might be covered by Universal's policy and some might not be.

Under the insurance policy, Universal is obligated to indemnify for an injury caused by an "occurrence," which is defined under the policy as an accident resulting in injury "neither intended nor expected" by the insured. Universal contends that the intentional acts alleged in Green's complaint do not constitute an "occurrence." Universal also argues that the allegations of breach of express warranty and violation of the Magnuson-Moss Warranty Act are not expressly covered under the policy because such is an allegation of a breach of contract. In addition to its argument regarding the term "occurrence," Universal argues that the insurance policy specifically excludes fraudulent or intentional acts committed by its insured. In light of its uncertainty as to these issues, Universal argued to the trial court that it was entitled to intervene

because, if valid, a determination of its liability under the insurance policy would be impossible if the jury returned a general verdict. The trial court, however, denied the petition to intervene. Universal appeals.

Consolidated with *East Central Alabama Ford-Mercury, Inc.* for purposes of this opinion are several cases in which Universal, as insurer of Youngblood-Perry Lincoln Mercury, Inc., and Franklin Perry, appeals from a denial by the trial court of its motion to intervene. These cases have previously been consolidated in *Universal Underwriters Ins. Co. v. Youngblood*, 549 So.2d 76 (Ala.1989); these were before this Court on a different issue. In July 1989, this Court affirmed the trial court's ruling in *Youngblood*, holding that Universal had a duty under its insurance policy to defend the 10 actions filed against its insureds. The cases consolidated in *Youngblood* involved claims alleging breach of contract, negligence, misrepresentation, and suppression of material facts.

After our ruling in *Youngblood*, Universal sought to intervene pursuant to A.R.Civ.P. 24(a)(2) and 24(b)(2) for the purpose of presenting to the trial court either special verdict forms or special interrogatories to be given to the jury at the end of the trial. In an argument analogous to its argument in *East Central Alabama Ford-Mercury, Inc.*, discussed above, Universal contends that it is faced with a situation where, under Universal's insurance policy, some of the claims made by the plaintiffs are covered, but others may not be covered. Universal argues that the incidents alleged in the contract counts are excluded from coverage by a provision in the policy, and that the acts of intentional fraud alleged in the misrepresentation and suppression-of-material-facts counts are not included within the policy's definition of an "occurrence." Universal further contends that if a general verdict is returned against the insured defendants, Universal will have no way to determine what claims are covered under the policy. Based on these arguments, Universal asserts that it has an interest relating to the subject matter of the action that, under the rules of Rule 19 and Rule 24, gives it a right of intervention in the alternative, that permissive intervention should be allowed. The trial court denied the petition, and Universal appeals.

DISCUSSION

[1] We first note that an order denying intervention as of right is appealable. *Thrasher v. Barnett*, 424 So.2d 605 (Ala.1982). Universal claims that intervention is proper as of right under A.R.Civ.P. 24(a) or permissively under Rule 24(b).

[2] Universal states that it is providing a defense for its insureds. East Central Alabama Ford-Mercury, Inc., Auburn Ford Lincoln-Mercury, Inc., Youngblood-Perry Lincoln Mercury, Inc., and Franklin Perry, pursuant to reservation of rights provisions whereby Universal may deny coverage after final determination of the case. Universal notes that under *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298 (Ala.1987), the attorney provided by the insurer to defend the insured is responsible to and obligated to the insured solely and not to the insurer. Under *L & S Roofing Supply*, the attorney provided by the insurer is constrained by an "enhanced obligation" to represent *only* the insured. The attorney under such a duty can take no action that would be detrimental to the insured's interest. It follows that defense attorneys hired by Universal for its insureds cannot represent Universal's interests and, consequently, cannot request special interrogatories or special verdicts concerning the coverage issue. Moreover, Universal is obligated to defend against all claims advanced by the insureds, even those not covered by the policy. *Ladner & Co. v. Southern Guaranty Ins. Co.*, 347 So.2d 100 (Ala.1977).

Universal argues that its interest will not be adequately protected unless it is allowed to intervene for the limited purpose of proposing special interrogatories or submitting special verdict forms to the jury so that the theories on which the jury's verdict is based can be determined. In support of this contention, Universal relies heavily on this Court's decision in *Alabama Hospital Association Trust v. Medical Assurance Society of Alabama*, 508 So.2d 1214 (Ala.1987). In that case, Alabama Hospital Association Trust ("AHAT"),

(Cite as: 574 So.2d 716)

appealed from a summary judgment entered in favor of Mutual Assurance Society of Alabama ("MASA"). The claim arose from a prior medical malpractice judgment against certain doctors, who were insured by MASA, and Lloyd Noland Hospital, who was insured by AHAT. Both insurers provided attorneys for their insureds. After the trial, the case was then submitted to the jury on plaintiff May's claim against Lloyd Noland based at least in part, if not wholly, on the negligence of Habachy and Park.' " *Id.* at 1211 (quoting the trial court's opinion). The attorneys failed to request any special findings of fact by the jury, and the jury returned a general verdict in favor of May and against the hospital. AHAT paid part of the judgment and MASA paid part. Subsequently, AHAT claimed that it was a subrogee of the hospital for the recovery from MASA for the portion of the judgment that had been paid by AHAT. AHAT argued that the claim and the subsequent judgment against the hospital were based only on the negligence of the doctors, and that as a result, MASA, as the doctors' insurer, was the primary insurer and AHAT was the secondary insurer. In support of its argument, AHAT presented an affidavit of Jerry Argo, the foreman of the jury that had rendered the general verdict against the hospital. The affidavit, however, was executed more than three years after the verdict had been rendered.

The trial court stated that " '[b]y submitting the affidavit of the foreman of the jury, AHAT sought in effect to establish special findings of fact by the jury verdict more than three years after the verdict was rendered.... [Such affidavit] cannot be admitted in evidence after the trial for the purpose of establishing the negligent conduct which was the basis of the jury verdict.' " *Id.* at 1212 (quoting the trial court's opinion) (citations omitted). The trial court further stated:

"In the present case now before this Court, the affidavits and answers of the 720 jurors to questionnaires make evident the reason for the rule disallowing the use of jurors' affidavits to explain their verdict or to in effect make special findings of fact with regard to their verdict.

"Counsel representing Lloyd Noland and supplied by AHAT could have asked the Court to require the jury to make special findings of fact at the time the case was submitted to the jury. AHAT and Lloyd Noland elected not to do so. They cannot now ask this Court to determine from the affidavits of the jurors or the other evidence submitted at the trial whether the verdict against Lloyd Noland was based on the negligence of Habachy and Park or whether the verdict against Lloyd Noland was based on evidence concerning the negligence of other physicians or employees of Lloyd Noland."

Id. at 1213. [FN1]

> FN1. This Court notes that under the facts of *Alabama Hospital Association Trust*, there was no issue presented regarding the enhanced obligation of the insurer to the insured. If, however, counsel representing Lloyd Noland and supplied by AHAT had requested special findings of fact at the time the case was submitted to the jury, a determination under the enhanced obligation criteria enunciated in *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298 (Ala.1988), would have been necessary.

This Court agreed with the rationale of the trial court:

"The issue in this case is whether the verdict in the May case against Lloyd Noland was based upon the jury's finding that Lloyd Noland was liable because of the negligence of the two medical doctors, Habachy and Park. This is impossible to resolve, because the verdict of the jury was a general one and because there was evidence from which the jury could have found liability as to Lloyd Noland based upon the negligence of other employees of Lloyd Noland. Absent a special verdict, the fact of coverage is impossible to prove."

Id. at 1213.

[illegible] argues that this Court recognized the impossibility of jurors recalled a general verdict to determine the theories on which the jury based its verdict and that it invited the trial court's judgment [illegible]

for a cure to the problem-- asking "the court to require the jury to make special findings of fact at the time the case [is] submitted to the jury." *Alabama Hospital Association Trust, supra*, at 1213. Universal further argues that *Alabama Hospital Association Trust* is on "all fours" with the present case, except that in *Alabama Hospital Association Trust* the secondary insurer was seeking indemnity from the primary insurer. Universal states that even though it wishes to submit interrogatories or special verdict forms to the jury, it does not intend to participate in the jury phase of the trial. Therefore, Universal argues, its limited participation would not affect the cases presented by the plaintiffs.

Further, Universal asserts that *Alabama Hospital Association Trust* overrules *United States Fidelity & Guaranty Co. v. Adams*, 485 So.2d 720 (Ala.1986), wherein the Court affirmed the trial court's denial of USF & G's motion to intervene in the underlying suit filed by the plaintiffs. In *Adams*, the plaintiffs sued Alabama Elk River Development Agency for damages suffered as a result of construction defects in a house purchased from Elk River. Elk River filed a third-party complaint against Highland Rim Constructors, Inc., the contractor. USF & G, insurer for Highland Rim, moved to intervene in the action pursuant to Rule 24(a)(2).

> "USF & G ... requested that it be allowed to intervene for the sole purpose of petitioning the trial court to submit the action to the jury on special verdicts with interrogatories. USF & G argued that its insurance policy with Highland Rim provided coverage for claims for damage as a result of faulty workmanship to the owner's personal property in the house, but excluded coverage for claims made for damage to the structure itself. USF & G asserted that, if the jury returned a general verdict, it would be impossible for USF & G to discern what portion of the verdict was awarded as a result of damage to personal property and what portion was for damage to the structure. Therefore, USF & G contended, the court should give the jury special verdict forms to specify how much of the award was for damage to the personal property in the house, as this is all it would be liable for under its policy with Highland Rim."

Id. at 721. The trial court, however, denied the motion and further denied USF & G's motion to reconsider. The trial court based its decision upon the determination that under Rule 24(a)(2), USF & G did not have an "interest" in the action. The trial court stated, and this Court agreed, that " '[t]he Petitioner does not have an interest in the transaction the subject of this lawsuit ' and that " '[i]ts interest is contingent upon the Plaintiffs' recovery of a verdict in the underlying action. The Petitioner may, by subsequent litigation, determine its liability in the event of the Plaintiffs' recovery.' " *Id.* (quoting the trial court's order).

The *Adams* Court also relied on *Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*, 725 F.2d 871 (2d Cir.1984), in which the court found that the interest asserted by the insurance company was contingent upon the jury's verdict and the determination of indemnification of certain types of losses under the policy. The court in *Restor-A-Dent* focused primarily on whether the insurer had an interest sufficient to trigger the application of Fed.R.Civ.P. 24(a)(2). Although the court noted that the term "interest" was not easily definable, it deferred to the United States Supreme Court's statement that the interest necessary to support intervention of right must be "significantly protectable." See *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971). That is, the interest must be direct and not remote or contingent. This Court concluded in *Adams* that USF & G had no interest in the transaction because the interest was contingent upon whether the plaintiffs recovered a judgment.

Universal argues that *Alabama Hospital Association Trust* overrules *Adams* because *Alabama Hospital Association Trust* postdates *Adams* and because *Adams* is based on A.R.Civ.P. 24 and 2, which requires a finding of an "interest." Universal bases its argument on the premise that the *Alabama Hospital Association Trust* Court recognized the insurer's dilemma and that the insurer was not a party to the underlying lawsuit.

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As a result, Universal maintains that this Court recognized the trial court's suggestion for a suit by way of special findings of fact as the only method in which the insurer could determine its contract obligation. Universal attempts to distinguish *Adams* by arguing that the court in *Adams* specifically found that the insurer did not have the interest required under Rule 24(a)(2), while the trial court in the present case made no such finding and summarily denied Universal's petition.

In her brief, Plaintiff Mamie Green argues that *Adams* controls and that Universal misinterprets *Alabama Hospital Association Trust*. In *Alabama Hospital Association Trust*, there was no motion to intervene, nor was there any suggestion that intervention would be proper.

We conclude that *Adams* and *Alabama Hospital Association Trust* involve different issues. In *Alabama Hospital Association Trust*, the insurer attempted to establish special findings of facts--an evidentiary finding--three years after the jury had rendered its general verdict. In *Adams*, however, this Court, following the trial court's findings, concluded that the insurer did not have a sufficient interest under A.R.Civ.P. 24(a)(2) because its interest was contingent upon the plaintiffs' recovery in the underlying action. Further, the *Alabama Hospital Association Trust* Court considered the issue of subrogation or indemnity against another insurer, but not the issue of intervention. Because *Alabama Hospital Association Trust* and *Adams* involve different issues, we conclude that *Adams* was not overruled by *Alabama Hospital Association Trust*. We note further that *Alabama Hospital Association Trust* is not applicable to the present case because that case did not address the issue of intervention under A.R.Civ.P. 24(a)(2) and 24(b)(2). The analysis in *Adams* is directly applicable on the issue of intervention.

Universal also contends that it has a sufficient interest under Rule 24(a)(2) because it has agreed to indemnify the defendants for certain contingent liabilities that may arise under the terms and conditions of its policies with the defendants. Universal argues that under the principle of indemnity it has an interest sufficient to warrant intervention as of right and that that interest is not contingent.

Plaintiff Green argues, in opposition, that *Adams*, *supra*, controls because the interest here, like the interest in *Adams*, is contingent upon Green's recovery in the underlying action. Moreover, Green notes that when an insurer refuses to defend or defends under a reservation of rights, the insurer is not precluded from determining the coverage issue in a declaratory judgment action either before or after the resolution of the underlying action. See also *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, *supra*, at 1303-04 (relying on *Tank v. State Farm Fire & Casualty Co.*, 105 Wash.2d 381, 715 P.2d 1133 (1986)). Additionally, as noted by Auburn Ford Lincoln-Mercury, Inc., the insureds would be prejudiced by further delay if Universal were allowed to intervene at such a late date in the proceedings.

A. INTERVENTION

In these consolidated cases, Universal moved to intervene under either A.R.Civ.P. 24(a)(2) or 24(b)(2). Rule 24(a)(2) provides for intervention of right:

> "Upon timely application, anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Rule 24(b)(2) provides for permissive intervention:

> "Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

Rule 24(a)(2)--Intervention of Right

[illegible] of the question [illegible]

concerning Universal's right of intervention is a determination of the "interest" necessary to sustain that right. In *State ex rel. Wilson v. Wilson*, 475 So.2d 194 (Ala.Civ.App.1985), the Department of Pensions and Security ("DPS") sought to intervene in a contempt proceeding brought by a mother against the father in an action seeking child support. The mother had assigned her child support rights to the State of Alabama in an agreement whereby DPS would establish, collect, and enforce the child support.

The Court of Civil Appeals held that under Rule 24(a)(2) DPS had an interest sufficient to enable it to intervene. The court stated:

> "To intervene in a proceeding under Rule 24(a)(2), *the intervenor must have a direct, substantial, and legally protectable interest in the proceeding. United States v. Perry County Board of Education*, 567 F.2d 277 (5th Cir.1978). There is no 'clear-cut test' to determine if such an interest exists. Rather, courts should use a flexible approach, which focuses on the circumstances of each application for intervention. *Perry County Board of Education*, 567 F.2d at 279."

Id. at 196 (emphasis added). The court found that as an assignee, DPS had a sufficient interest in collecting the child support payments regardless of whether DPS made payments to the mother and regardless of whether the assignment took place before the divorce. Moreover, the court indicated that it was doubtful that DPS could be adequately represented in the contempt proceeding without intervention. The court further stated, "We must adopt an approach to Rule 24(a)(2) which measures the right to intervene 'by a practical rather than a technical yardstick.' " *Id.* at 197. The court noted that the legislature intended that §§ 38-10-1 through -11, Ala.Code 1975 (1975), which provide for the enforcement and collection of child support, were to be construed broadly to effectuate the purpose of having parents, not the state, support their children.

This issue has also been analyzed in two other cases. [illegible] (Ala.[illegible]) (payment of sheriff's salary from county funds was a sufficient interest to allow the county intervention as of right in the sheriff's suit against the state for collection of his salary), and *Blue Cross & Blue Shield of Alabama v. Willis*, 526 So.2d 595 (Ala.Civ.App.1988) (insurer's interest in the possible recovery of previously paid medical expense payments did not entitle it to intervene as of right in an underlying workmen's compensation case). See also *United States Fidelity & Guaranty Co. v. Adams, supra*.

This Court has held that an insurer does not have an interest when that interest is contingent upon the recovery in another action. *United States Fidelity & Guaranty Co. v. Adams, supra.* We find no rationale to distinguish *Adams* from the present case. In light of the foregoing authority, we find that Universal does not have a direct, substantial, and protectable interest. Because Universal lacks such an interest under Rule 24(a)(2), it may not intervene as of right. Nevertheless, nothing in our law would bar Universal from litigating the coverage issue in a declaratory judgment action after the resolution of the underlying cases in this matter.

2. Rule 24(b)(2)--Permissive Intervention

[4] Permissive intervention under Rule 24(b)(2) is within the broad discretion of the trial judge. See *Restor-A-Dent Dental Laboratories, Inc., supra.* The standard for determining whether permissive intervention should have been allowed is whether the trial judge abused his or her discretion.

In *Restor-A-Dent*, the trial judge denied the insurer's motion to intervene under Rule 24(b)(2) because such intervention would burden the litigation in progress because of the delay. In affirming the trial judge's decision, the Court of Appeals noted that if this were the only reason for denying the motion then there would be an abuse of discretion. However, the Court of Appeals held that the trial court properly denied the motion because of additional reasons, including (1) that the insurer had no great need for the relief it sought, (2) that there was no assurance that the main action would not be delayed, and (3) that the intervention by an insurer who supplied the insured's attorney

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could deter a settlement or could create a conflict of interest. The court noted that trial court had the discretion to grant intervention and that if intervention was granted, then "in view of the economy of time and effort inherent in the use of interrogatories in this situation," the limited use of interrogatories to the jury would not be an abuse of discretion. *Id.* at 877.

Unlike Rule 24(a)(2), Rule 24(b)(2) is a discretionary tool to be used by the trial courts. In the present case, we find no abuse of discretion in the trial court's order denying intervention. Although the present case may be completely resolved if a jury in the underlying cases returns a verdict for the defendants, or if the plaintiffs proceed on undisputed claims, we, nevertheless, recognize the dilemma faced by insurers. Because of this dilemma, we set forth a procedure by which permissive intervention may be allowed in this and similar cases.

PROCEDURE

[5] Under this alternative procedure for permissive intervention, the trial would be bifurcated. In the first phase of the trial, the jury or judge would resolve issues of liability between the plaintiff and the insured defendant. The second phase would occur only if the jury or judge in the first phase rendered a verdict or judgment against the insured defendant. In the second phase, the insurance company would be allowed to enter and try, before the same jury or judge, only the insurance coverage issue. We emphasize that because of the many factors involved, a bifurcated *724 trial is not a matter of right for the insurer, but, rather, the decision of whether to allow intervention under this alternative procedure will rest within the discretion of the trial court as governed by the interests of justice and those factors articulated in A.R.Civ.P. 42(b). In order to avail itself of this remedy, the insurer must make, within a reasonable time, a motion to intervene under this procedure. The motion should be similar to a complaint for declaratory judgment made pursuant to A.R.Civ.P. 57. Should the trial court choose to allow intervention under this procedure, the insurer would be instructed to proceed with all parties in the underlying action. We note particularly that the insurer would be required to make available to the plaintiff, in the underlying action, all facts discoverable pursuant to the Alabama Rules of Civil Procedure, as well as the relevant insurance policy or policies. During the first phase, neither the jury nor the judge would consider the insurer's participation or the coverage issue. The jury would become aware of the insurer and the coverage issue only in the event that it rendered a verdict in the plaintiff's favor in the first phase. The judge would consider the coverage issue only if he or she rendered a judgment for the plaintiff in the first phase. If such a verdict or judgment occurs, then the trial would proceed to the second phase. In the second phase, the same jury or judge would hear and decide the coverage issue between the defendant insured and the insurer.

Bifurcated trials are not unusual in Alabama and are recognized under A.R.Civ.P. 42(b):

> "The court, *in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim,* cross-claim, counterclaim, or third-party claim, *or of any separate issue or of any* number of claims, cross-claims, counterclaims, third-party claims or *issues,* always preserving inviolate the right of trial by jury as declared by Article 1, Section 11 of the Alabama Constitution of 1901."

Id. (emphasis added.) The comments to Rule 42(b) further emphasize that a trial court has broad freedom to order separate trials on different issues or with respect to different parties in order to effectuate the goals of justice and judicial economy. This Court recognized in *Coburn v. American Liberty Insurance Co.*, 341 So.2d 717 (Ala.1977), that Rule 42(b) may be used to separate the issues of liability from those of damages in a negligence case. The Court noted that the trial court is in a "position to evaluate, within the posture of the case, the matter of trial convenience and to shape the order of trial." See also *Ex parte S. B. Fleming & Associates, Inc.*, 492 So.2d 54 (Ala.1986). Rule 42(b) gives the trial courts great flexibility in prompt litigation of [illegible] *Ex parte Alfa Mut. Ins. Co.*, 626 So.2d 1321 (Ala.1993) (distinguishing

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between separation and severance.

In addition to Rule 42(b), the Alabama Rules of Civil Procedure provide for separation of liability insurance coverage claims from damages claims. A.R.Civ.P. 18(c) provides as follows:

"In no event shall this or any other rule be construed to permit a jury trial of a liability insurance coverage question jointly with the trial of a related damage claim against an insured."

The comments to Rule 18(c) add:

"The provisions of Rule 18(c) have been inserted to prevent a joint trial on the issue of insurance coverage and a related damage claim in those actions wherein the provisions of Rule 18 have permitted joinder of those claims for pleading purposes or where such an issue is presented by third party action, counterclaim, cross-claim or in a declaratory judgment proceeding."

In *Desroches v. Complete Auto Transit, Inc.*, 409 So.2d 417 (Ala.1982), the trial court ordered separate trials on the issue of liability and the issue of the validity of release agreements. In *Desroches*, the plaintiff signed release agreements and covenants not to sue and accepted money from the insurance company. She later retained counsel and sought to return the money and rescind the release agreements, *725 but the insurance company refused, and an action ensued. The defendants successfully moved the trial court to order separate trials on the issues of liability and of the validity of the release agreements. The plaintiff argued that the trial court exceeded its authority under Rule 42 in ordering separate trials. This Court, however, stated that "[f]or resolution of this issue we need look no further than subsection (b) of Rule 18, A.R.C.P." *Id.* at 418. See also *Holloway v. Nationwide Mutual Ins. Co.*, 376 So.2d 698 (Ala.1979) (recommendation on remand that A.R.Civ.P. 18(c), 21, and 42(b) be utilized to avoid problems encountered at trial). Clearly, bifurcated trials are recognized and used in Alabama procedure in "furtherance of convenience or to avoid prejudice, or when [either] conducive to expedition and economy." A.R.Civ.P. 42(b).

Although we recognize that Rules 42(b) and 18(c) are primarily applicable to joinder issues, we treat these rules as instructive. The trial courts should consider the foregoing as guidance in deciding whether to allow permissive intervention under the procedure announced in this case.

We take special note of the distinction made in *Key v. Robert M. Duke Ins. Agency*, *supra*, between an order of severance and an order for separate trials. As stated in *Key*, severed claims become independent actions with judgments entered independently, while separate trials lead to one judgment. *Key* held that A.R.Civ.P. 54(b) applied "to actions in which 'separate trials' are ordered pursuant to Rule 42(b)," but did not apply to claims severed from the original action. *Id.* at 783. [FN2] Because of the distinction between a severance and an order of separate trials and because of this Court's reliance on Rule 42(b) for the alternative procedure, we envision that this procedure for permissive intervention would result in *separate* trials--a first trial on the issue of liability and a second trial on the issue of insurance coverage. The logical result of the distinction made in *Key* between separate trials and severance is that the case would be final and appealable only when the necessary trials are completed.

FN2. A.R.Civ.P. 54(b) provides:

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. Except where judgment is entered as to defendants who have been served pursuant to Rule 4(f), in the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims

or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Other jurisdictions have also recognized the utility of bifurcated trials. In California, the Court of Appeal in *Equitable Life Assurance Society v. Berry,* 212 Cal.App.3d 832, 260 Cal.Rptr. 819 (1989), held that bifurcation of trial to try the issue of insurance coverage was proper. See also *Ahmed v. Peterson,* 186 Cal.App.3d 374, 230 Cal.Rptr. 636 (1986) (bifurcation of breach of contract claim from negligence claim for purposes of introducing evidence was proper remedy); *Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc.,* 167 Ga.App. 532, 307 S.E.2d 13 (1983) (severance is a matter of discretion for the trial judge.). See generally Page & Sigel, *Bifurcated Trials in Texas Practice: The Advantages of Greater Use of Texas Rule of Civil Procedure 174(b),* appearing in 9 Rev. Litigation 49 (1990) and 53 Tex.B.J. 318 (April 1990) (expounding on the benefits of bifurcated trials under Rule 174(b), Texas Rules of Civil Procedure--a provision similar to A.R.Civ.P. 42(b)).

In addition, we note that the Wisconsin legislature and judiciary have recognized the dilemma faced by insurance companies on insurance coverage disputes and have provided a remedy similar to the one enunciated in the present case. The Wisconsin legislature provided:

> *726 "If an insurer is made a party defendant pursuant to this section and it appears at any time before or during the trial that there is or may be a cross issue between the insurer and the insured or any issue between any other person and the insurer involving the question of the insurer's liability if judgment should be rendered against the insured, the court may, upon motion of any defendant in the action, cause the person who may be liable upon such cross issue to be made a party defendant to the action and all the issues involved in the controversy determined in the trial of the action or any 3rd party may be impleaded as provided in s. [Wis.Stat. §] 803.05. [*Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting separate trials on the issue of liability to the plaintiff or other party seeking affirmative relief on the issue of whether the insurance policy in question affords coverage. Any party may move for such separate trials and if the court orders separate trials it shall specify in its order the sequence in which such trials shall be conducted.*"

Wis.Stat. § 803.04(2)(b) (1988) (emphasis added).

In *Mowry v. Badger State Mut. Casualty Co.,* 129 Wis.2d 496, 385 N.W.2d 171 (1986), a case involving breach of contract and bad faith failure to settle within the insurance policy limits, the Wisconsin Supreme Court recognized the competing interests between an insured, an insurer, and a plaintiff in an action for damages:

> "When an insurer is certain of its insured's liability for an accident and where damages to the victim exceed policy limits, the insurer would normally be responsible for indemnifying its insured to the extent of its policy limits. The insurer, however, experiences a conflict of interests whenever an offer of settlement within policy limits is received where a legitimate question of coverage under the policy also exists.
>
> The insurer will be reluctant to settle within policy limits if there is a likelihood that coverage does not exist...."

129 Wis.2d at 507-512, 385 N.W.2d at 177-78 (citations omitted). The court in *Mowry* found that the insurance company did not act in bad faith in refusing to settle the claim within the policy limits, because the issue of coverage was fairly debatable. *Id.* at 512-16, 385 N.W.2d at 179-80. The court further noted:

> "[T]his court has endorsed the use of the separation mechanism to avoid conflicts of interest between the insured and the insurer. The separation procedure is, to some extent, mutually beneficial: The insurer is able to ascertain whether coverage exists prior to its indemnification of the insured; the insured is able to ascertain prior to the insurer's undertaking of his defense whether the defense would have had any taint of a conflict of interest due to a coverage question.

Section [illegible] authorizes the trial court to sever and try issues separately, at its discretion. The statute does not on its face affect the rights and duties to a contract. As we mentioned above, however, the existence of coverage under a contract precedes an insurer's duty to settle. The precise reason an insurer litigates a coverage issue is to release itself from any settlement and defense obligations. To require it to settle prior to the coverage trial is antithetical to the purpose of the bifurcation statute. Thus, the mere fact that an insurer refuses an offer to settle within policy limits during the pendency of a coverage trial does not mean that the insurer has breached a duty owed to its insured."

Id. 385 N.W.2d at 183-84. [FN3]

FN3. The dissent in *Mowry* argued that, unlike the policy holder, the insurance company could better protect itself from liability for damages exceeding the policy limits by *timely* litigating the coverage issue before a settlement offer is made, and therefore the insurer, and not the insured, should bear the loss. As noted by the dissent, the insurer did not litigate the coverage issue in the bifurcated proceeding until a year and a half after the commencement of the action. *Id.* at 191 (Abrahamson, J., dissenting).

Because the present case introduces an alternative method for permissive intervention, *727 the trial court on remand may, in its discretion, grant or deny Universal's motion to intervene in a bifurcated action. If the trial court grants the motion to intervene for bifurcated trials, it should permit discovery with respect to Universal by the plaintiffs and schedule the proceedings for completion and trial by a set date. In the future, however, the insurer must file its motion to intervene in a bifurcated action within a reasonable time of its determination that insurance coverage disputes may exist. As with any discretionary device, the trial court's action, if such motions will be measured under the "abuse of discretion" standard. In addition, insurers and insureds, in the present case and in future cases, may have separate counsel. We emphasize that the trial courts must take extreme care so as to prevent inconsistent verdicts through the use of this procedure.

CONCLUSION

[6] In light of the law under *United States Fidelity & Guaranty Co. v. Adams, supra*, and its progeny, we hold that Universal has not shown the required interest under A.R.Civ.P. 24(a)(2) to entitle it to intervene as of right. Further, we find no abuse of discretion in the trial court's denial of permissive intervention under A.R.Civ.P. 24(b)(2). However, in light of the alternative procedure set forth herein, we remand the case to the trial court for further consideration. Accordingly, the orders denying intervention are affirmed, and the cases are remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

MADDOX, ALMON, SHORES and ADAMS, JJ., concur.

JONES, J., dissents, with opinion.

HOUSTON, J., dissents.

JONES, Justice (dissenting).

The majority opinion gives new meaning to the old expression "Too much sugar for a dime." "Overkill" is a mild description for the complicated bifurcated procedure prescribed by the majority as a substitute for the simple use of Rule 49, A.R.Civ.P. Having voluntarily offered to submit itself to the jurisdiction of the court and thus having agreed to be bound by the jury verdict in the trial by the plaintiff against its potential insured, Universal, the insurer, asks simply to be allowed to intervene for the limited purpose of invoking Rule 49, which authorizes the jury's use of special interrogatories to designate under which, if any, of the claims it found for the plaintiff.

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One would have thought (or at least I did) that the intervention prescribed in *Lowe v. Nationwide Ins. Co.*, 521 So.2d 1009 (Ala.1988), would be interpreted as direct authority (if, indeed, common sense was not of itself sufficient authority) for the proposition that Universal's interest in the outcome of the instant litigation, albeit both limited and contingent, would permit intervention concomitant with its limited interest. Indeed, Nationwide's interest in the *Lowe* case was equally limited and contingent.

The insurer's interest in both this case and in *Lowe*, in a broad sense, deals with the issue of coverage. In *Lowe*, the insured had no underinsured coverage (and, thus, the insurer had no liability) unless the jury's verdict for the plaintiff exceeded the amount of the primary coverage. Here, the insurer has no liability to the plaintiff, unless the jury awards the plaintiff damages under a theory of liability for which the policy provides coverage. A general verdict for this plaintiff may be sufficient for execution against these defendants, but, because certain of the plaintiff's theories are clearly outside the coverage provided by the policy, it would obviously not be sufficient for execution against Universal. This, then, is the classic case for the invocation of Rule 49.

*728 To be sure, its use may not answer all of the coverage questions necessary for the final disposition of questions regarding Universal's liability, but it will do all that ought to be done in the present litigation; and, if necessary, it will furnish a concrete basis for any future litigation between the plaintiff and the defendant's insurer. (For example, a verdict for the plaintiff under the fraud claim may not answer the ultimate "occurrence" issue.)

With all its sophistication, the majority's scheme for bifurcation leaves unanswered myriad problems. For example, the opinion seems oblivious to the fact that once the trial is over, if we assume the plaintiff wins, the trial jury will not proceed with the same battery of lawyers. Universal must now wave goodbye to those lawyers who lost the first round and hire a new set of lawyers to try the second round. How does this awkward and time-consuming procedure square with the goals of judicial economy and caseload reduction, when compared with the simple invocation of Rule 49, which, in most instances, will dispose of the entire case?

In conclusion, I make three additional observations:

1. In answer to the plaintiff's fears that to allow intervention under these circumstances would permit the intervenor to clutter the lawsuit with a variety of interrogatories and thus confuse the jury, I would answer simply that trial judges know how to draft fair and impartial jury instructions, including interrogatories contemplated by Rule 49.

2. I cannot understand how the plaintiff will be prejudiced rather than aided by the trial court's granting of the petition for limited intervention. If the plaintiff intends to execute judgment only against the defendants (the insureds), the plaintiff can strip the insurer of any interest, and thus defeat the right of intervention, by merely confessing of record its intention not to proceed against the insurance company. If, on the other hand (as is most likely the case), the plaintiff intends to collect any judgment from the insurer, a general verdict that is based on multiple claims or theories, any one of which is not covered by the insurance policy, will avail the plaintiff nothing; and any further proceedings to clarify the coverage issue will not only require a retrial of the issues of liability, but will also risk a contrary result. If any two of the claims submitted to the jury are mutually exclusive, a general verdict for the plaintiff must be set aside as inconsistent. *National Security Fire & Cas. Co. v. Vinson*, 454 So.2d 942 (Ala.1984); and, even if the claims are cumulative, if any one is determined not to be covered by the policy, there is no way of knowing that the jury based its verdict on a covered claim. Perhaps this is the reason legal commentators refer to Rule 49 as the "judge's rule," lawyers refuse to use it even when it would be in their best interest.

3. In the trial judge's [illegible] circumstances where, as here, a general verdict is inappropriate, the jury

own initiative and avoid a bifurcated trial simply by invoking the procedure authorized by Rule 20.

ON APPLICATION FOR REHEARING

HORNSBY, Chief Justice.

OPINION MODIFIED. APPLICATION FOR REHEARING OVERRULED.

MADDOX, ALMON, SHORES and ADAMS, JJ., concur.

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WESTLAW

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(Cite as: 781 So.2d 172)

Supreme Court of Alabama.
MUTUAL ASSURANCE, INC
v.
Phillip CHANCEY and Beth Chancey.
1982161.

May 26, 2000.
Opinion Modified on Denial of Rehearing
Sept. 29, 2000.

Liability insurer sought to intervene for purpose of requesting interrogatories or special verdict forms in suit by patient against insured physician and medical practice. The Montgomery Circuit Court, No. CV-98- 2355, Eugene W. Reese, J., denied insurer's motion to intervene, and insurer appealed. The Supreme Court, Cook, J., held that: (1) insurer was not entitled to intervention as of right, and (2) trial court did not abuse its discretion in denying insurer's request for permissive intervention.

Affirmed.

Lyons, J., concurred specially and filed opinion.

Houston and See, JJ., dissented and filed opinions.

West Headnotes

[1] **Parties** ⚖41
287k41 Most Cited Cases
Liability insurer was not entitled to intervention as of right for purposes of requesting interrogatories or special verdict forms in medical-malpractice action against its insured, as insurer could litigate coverage issue in declaratory-judgment action after resolution of underlying claims against its insured. Rules Civ.Proc., Rule 24(a)(2).

[2] **Appeal and Error** ⚖95
30k95 Most Cited Cases
An order denying intervention as of right is appealable.

[3] **Declaratory Judgment** ⚖45
118Ak45 Most Cited Cases
Jurisdiction of a declaratory-judgment action will not be entertained if there is pending at the time of the declaratory-judgment action another action or proceeding to which the same persons are parties, and in which are involved and may be adjudicated the same identical issues that are involved in the declaratory-judgment action.

[4] **Parties** ⚖41
287k41 Most Cited Cases
Trial court's denial of liability insurer's motion for permissive intervention in medical-malpractice action against insureds for purposes of requesting interrogatories or special verdict forms was not abuse of discretion, as insurer failed to demonstrate how alternative procedure, which allowed insurer to enter case and try insurance coverage issue after liability had been found, would not allow it to determine whether judgment would fall within scope of insured's coverage. Rules Civ.Proc., Rule 24(b)(2).

[5] **Appeal and Error** ⚖949
30k949 Most Cited Cases

[5] **Parties** ⚖38
287k38 Most Cited Cases
Permissive intervention is within the broad discretion of the trial court and the court's ruling on a question of permissive intervention will not be reversed unless the court clearly abuses its discretion. Rules Civ.Proc., Rule 24(b)(2).

*173 Bibb Allen, Deborah Alley Smith, and Susan Scott Hayes of Rives & Peterson, P.C., Birmingham, for appellant.

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M. Dent III of Cunningham, Bounds, Yance, Crowder & Brown, L.L.C., Mobile, for appellees Phillip Chancey and Beth Chancey.

Stanley Rodgers and Jeffrey T. Kelly of Lanier Ford Shaver & Payne, P.C., Huntsville, for appellee Kimberly Whitchard.

Michael K. Wright and Sybil Vogtle Abbot of Starnes & Atchison, L.L.P., Birmingham, for appellee East Alabama Behavioral Medicine, P.C.

Carol Ann Smith and J. Tobias Dykes of Smith & Ely, L.L.P., Birmingham, for amicus curiae Alabama Defense Lawyers Ass'n.

COOK, Justice.

Phillip Chancey and his wife Beth Chancey sued Dr. Kimberly Whitchard and her employer, East Alabama Behavioral Medicine ("EABM"), stating claims based primarily on theories of negligence, wantonness, and "abandonment." Mutual Assurance, Inc., the defendants' liability insurer, moved to intervene. The trial court denied the motion to intervene, and Mutual Assurance appealed from the denial. We affirm.

Mutual Assurance sought to intervene for the purpose of requesting interrogatories or special verdict forms so that it could ascertain the basis of the jury's verdict in case the jury finds against its insureds. Mutual Assurance contends that it is seeking to resolve any questions regarding coverage so that if a judgment is rendered against its insureds, it will know if the judgment falls within the scope of the insureds' coverage.

Mutual Assurance states in its brief:

"During 1996, Mutual Assurance had in force a policy of liability insurance insuring Kimberly Whitchard and EABM. The policy provides that it will pay all sums that the insureds become legally liable to pay as damages because of a medical incident which is reported during the policy period or any extended reporting period. The policy defines medical incident as 'a single act or omission or a series of related acts or omissions arising out of the rendering of, or the failure to render professional services to any one person ... by the named insured or any person for whose acts or omissions the Named Insured is legally responsible ... which results or is likely to result in damages or a claim or suit. The policy defines professional services as the provision of medical opinions or medical advice.... The policy excludes liability 'arising out of any willful, wanton, fraudulent, criminal or malicious act or omission.' Exclusion (e) of the policy eliminates coverage for liability 'arising out of sexual activity, or acts *174 in the furtherance of sexual activity on the part of the Named Insured or any person for whose acts the Named Insured is legally responsible, whether under the guise of treatment or not, and provided that this exclusion shall not apply to the defense of suits for which coverage is otherwise afforded.' Liability arising out of the intentional acts of the Insured is excluded in exclusion (d)."

Appellant's Brief, p. 2. [FN1]

FN1. Mutual Assurance's insurance policy is not included in the record on appeal.

Mutual Assurance contends that the trial court abused its discretion in denying its motion to intervene. It urges this Court to overrule *Universal Underwriters Insurance Co. v. East Central Alabama Ford-Mercury, Inc.* ("*Universal I*"), 574 So.2d 716 (Ala.1990), and *United States Fidelity & Guaranty Co. v. Adams*, 485 So.2d 720 (Ala.1986), and to recognize on the part of a defendant's liability insurer an absolute right to intervene in order to request interrogatories or special verdict forms to ascertain the basis of any verdict against the defendant. Mutual Assurance asserts that, absent intervention, it will not be able to ascertain whether a judgment against its insureds falls within the scope of its coverage.

I.

FN2. "[A]n order denying intervention as of right is appealable." *Universal I*, supra, 574 So.2d at 71[illegible]. See also [illegible] So.2d [illegible] (Ala.19[illegible]). Rule 24[illegible], Ala. R. [illegible], provides for intervention as of right.

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"Upon timely application, anyone shall be permitted to intervene in an action: ... 2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

As Mutual Assurance points out, we addressed this issue in *Universal I* and in *Adams*, holding that an insurer has no absolute right to intervene in an action against its insured. Mutual Assurance asks us to overrule *Universal I* and *Adams* and their progeny and to recognize an insurer's right to intervene because, it argues, (1) a liability insurer has a sufficiently direct interest to support a right to intervene in an action against its insured if the claims may or may not be covered by the insurance policy, [FN2] and (2) a declaratory-judgment action is an insufficient alternative in cases where the question of coverage is dependent upon the factual basis of a jury's verdict.

FN2. Mutual Assurance urges this Court to adopt Justice Jones's dissenting opinion in *Universal I*.

We decline Mutual Assurance's request to overrule *Universal I* and *Adams*. In *Universal I*, as in the instant case, the defendant's insurer sought to intervene in an action brought against its insured; it sought intervention "for the sole purpose of submitting special interrogatories or a special verdict form to the jury." 574 So.2d at 718. We concluded that an insurer "does not have a direct, substantial, and protectable interest" under Ala. R. Civ. P. 24(a)(2) because its interest is contingent upon the plaintiff's recovery on the underlying claims. See also *Adams*, supra. We find no basis on which to distinguish this present case from *Adams* and its progeny and no compelling reason to overrule *Universal I*, *Adams*, and their progeny. Therefore, in this case, as we held in *Universal I* and *Adams*, the trial court correctly denied the insurer's motion to intervene as a matter of right. See also *Employers Fire Ins. Co. v. Canal Ins. Co.*, 626 F.2d 393 (5th Cir.1980).

725 F.2d 57 (2d Cir.1983).

In *Universal I*, we stated that the insurer would not be barred from litigating the coverage issue in a declaratory-judgment action after the resolution of the underlying claims against its insured. See *Universal I*, 574 So.2d at 723. Mutual Assurance contends that a declaratory-judgment action litigating the coverage issue following the resolution of this action based on the claims against its insureds will be insufficient because, it says, the declaratory action could involve the same factual issues that are to be adjudicated in this action against its insureds. Mutual Assurance argues that a declaratory-judgment action would be dismissed because it would present an issue that had been presented in this present action against its insureds.

[3] " 'Jurisdiction of a declaratory judgment action will not be entertained if there is pending at the time of the declaratory judgment action another action or proceeding to which the same persons are parties, and in which are involved and may be adjudicated the same identical issues that are involved in the declaratory judgment action.' " *Home Ins. Co. v. Hillview 78 West Fire District*, 395 So.2d 43, 44 (Ala.1981), quoting *Mathis v. Auto-Owners Ins. Co.*, 387 So.2d 166, 167 (Ala.1980). See also *Ex parte Breman Lake View Resort, L.P.*, 729 So.2d 849 (Ala.1999). However, the threshold issue of coverage in a potential declaratory-judgment action by Mutual Assurance and the issues presented in this underlying action against the insureds are not the same. Therefore, a declaratory-judgment action to determine the coverage issue would not be foreclosed.

II.

[4] Mutual Assurance also argues that the trial court abused its discretion in denying Mutual Assurance's motion for permissive intervention under Rule 24(b)(2). It argues that even though, if the jury in the present action finds against its insureds it would have the right to file a declaratory-judgment action, a declaratory-judgment action would not allow it to determine what the jury relied on in finding against the insureds.

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Rule 24(b) permits permissive intervention: "Upon timely application ... [a] when an applicant's claim or defense and the main action have a question of law or fact in common." That rule provides that "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[5] We also addressed this issue in *Universal I*, supra, in which we held that it was not an abuse of discretion for a trial court to deny an insurance company's motion for permissive intervention for the purpose of requesting special verdict forms or interrogatories for submission to the jury. See also *Universal Underwriters Insurance Co. v. Anglen* ("*Universal II*"), 630 So.2d 441 (Ala.1993). Permissive intervention is within the broad discretion of the trial court and the court's ruling on a question of permissive intervention will not be reversed unless the court clearly abuses its discretion. *Universal II*, 630 So.2d at 443. Although Mutual Assurance argues that it cannot, under our present "alternative procedure," inquire of the jury the *176 basis for its finding, Mutual Assurance has not demonstrated to this Court why that alternative procedure, set forth in *Universal I*, will not allow it to achieve its objective. [FN3] The alternative procedure would allow Mutual Assurance to accomplish its objective *after* the resolution of the underlying claims against its insureds, without prejudicing the plaintiffs or the defendants in this action presenting those claims.

FN3. In *Universal I*, we developed the following alternative procedure allowing permissive intervention:

"Under this alternative procedure for permissive intervention, the trial would be bifurcated. In the first phase of the trial, the jury or judge would resolve issues of liability between the plaintiff and the insured defendant. The second phase would occur only if the jury or judge in the first phase rendered a verdict or judgment against the insured defendant. In the second phase, the insurance company would be allowed to enter and try before the same jury or judge only the insurance coverage issue. We emphasize that because of the many factors involved, a bifurcated trial is not a matter of right for the insurer, but, rather, the decision of whether to allow intervention under this alternative procedure will rest within the discretion of the trial court as governed by the interests of justice and those factors articulated in [Ala.] R. Civ. P. 42(b). In order to avail itself of this remedy, the insurer must make, within a reasonable time, a motion to intervene under this procedure. The motion should be similar to a complaint for declaratory judgment made pursuant to [Ala.] R. Civ. P. 57. Should the trial court choose to allow intervention under this procedure, the insurer would be included in the discovery process with all parties in the underlying action. We note particularly that the insurer would be required to make available to the plaintiff, in the underlying action, all facts discoverable pursuant to the Alabama Rules of Civil Procedure, as well as the relevant insurance policy or policies. During the first phase, neither the jury nor the judge would consider the insurer's participation or the coverage issue. The jury would become aware of the insurer and the coverage issue only in the event that it rendered a verdict in the plaintiff's favor in the first phase. The judge would consider the coverage issue only if he or she rendered a judgment for the plaintiff in the first phase. If such a verdict or judgment occurs, then the trial would proceed to the second phase. In the second phase, the same jury or judge would hear and decide the coverage issue between the defendant insured and the insurer."

Universal I, 571 So.2d at 923-24.

Based on the facts of this case, we conclude that the trial court did not abuse its discretion in denying Mutual Assurance's motion to intervene. We see no compelling reason to overrule *Universal I* and

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Adams, or to reject the alternative procedure we set out in Universal II by which permissive intervention may be allowed. The order denying intervention is affirmed, based on the authority of Universal I, Universal II, and Adams.

AFFIRMED.

MADDOX, BROWN, JOHNSTONE, and ENGLAND, JJ., concur.

LYONS, J., concurs specially.

HOUSTON and SEE, JJ., dissent.

LYONS, Justice (concurring specially).

Whether to allow an insurer permissive intervention, pursuant to Rule 24(b), Ala. R. Civ. P., in a tort action against its insured, so that the insurer can invoke Rule 49, Ala. R. Civ. P., and thereby obtain clarification of coverage issues, falls within the sound discretion of the trial court. Allowing such intervention, therefore, would not constitute an abuse of discretion. Further, even if the court denies the motion to intervene, the trial court could use Rule 49 in submitting the tort claim to the jury. Finally, a trial court could deny the intervention motion conditionally, based upon the condition that the party opposing *177 intervention acquiesces in the use of Rule 49, so long as the substantial rights of other parties are not affected.

HOUSTON, Justice (dissenting).

I would reverse and remand, because I would overrule *Universal Underwriters Ins. v. East Central Alabama Ford-Mercury, Inc.*, 574 So.2d 716 (Ala.1990), and *United States Fidelity & Guaranty Co. v. Adams*, 455 So.2d 720 (Ala.1984). *USF & G v. Adams* was decided by a division of this Court; because I was not a member of that division, I had no opportunity to vote on the opinion in that case. I dissented in *Universal Underwriters*, and, although the case as released did not show that I joined Justice Jones's dissenting opinion, I did. See *Universal Underwriters Ins. Co. v. Taylor*, 707 So.2d 77, ___ (Ala.1997) (Houston, J., concurring in part and dissenting in part). A liability insurer has a right to intervene in an action against its insured when that action asserts both covered and noncovered claims, to ascertain, through the use of a special verdict form or interrogatories to the jury, the factual basis of any verdict returned against its insured.

Mutual Assurance should not be precluded from seeking a change in the law by reason of its not having requested relief under Rule 24(a), Ala. R. Civ. P., to which it was not entitled under existing law and which the trial court could not have granted under existing law. "Alabama law does not require the performance of a vain or useless act." *Mutual Assurance, Inc. v. Wilson*, 716 So.2d 1160, 1165 (Ala.1998). See *Goodyear Tire & Rubber Co. v. Vinson*, 749 So.2d 393, 403 (Ala.1999) (on application for rehearing) (Houston, J., dissenting, joined by Maddox, J.).

SEE, Justice (dissenting).

The majority concludes correctly that our precedent requires an affirmance of the trial court's order denying Mutual Assurance's motion to intervene in this action. See *Universal Underwriters Ins. Co. v. East Cent. Alabama Ford-Mercury, Inc.*, 574 So.2d 716 (Ala.1990). However, I agree with Justice Houston that this Court should overrule *Universal Underwriters*. As this Court has recognized, "[a]bsent a special verdict, the fact of coverage is impossible to prove." *Alabama Hospital Ass'n Trust v. Mutual Assurance Soc'y of Alabama*, 538 So.2d 1209, 1216 (Ala.1989). This Court's attempt to craft an alternative by permitting the insurer to litigate the issue of coverage before the same jury that decided liability, see *Universal Underwriters*, 574 So.2d at 723-24, requires (1) that the insurer litigate its claim before a jury it had no role in selecting, (2) that the insurer's counsel overcome the rapport opposing counsel has developed with the jury, and (3) that the insurer face the potential prejudice inherent in having the jury that determined the plaintiff was entitled to recover also determine whether the defendant's insurance carrier that liability. When an action against an insured includes both covered and

noncovered claims, the insurer should be permitted to intervene in that action for the limited purpose of requesting a special verdict form or special interrogatories in order to discern the factual basis of any verdict against the insured. I respectfully dissent.

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EXHIBIT "C"

IN THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

WHITTELSEY PROPERTIES, INC., ET AL.,	)	
Plaintiffs,	)	
V.	)	CASE NO.: CV 2005-137
MANIFOLD CONSTRUCTION, LLC., ET AL.,	)	
Defendants.	)	

ORDER

The Court inadvertently granted the *Motion to Intervene*. Upon further review of the submissions of the parties, the Court withdraws its previous order and will reconsider when the case is set for trial.

ORDERED this the 26 day of April 2006.

BRAD MENDHEIM
ACTING CIRCUIT JUDGE
LEE COUNTY

FILED
APR 28 2006
IN OFFICE
CORINNE T. HURST
CIRCUIT CLERK